Court, U. S.
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OCT 16 1975
MICHAEL RODAK, JR., CLERK

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-5761

FRANK ERHARD,
Petitioner,

VERSUS

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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October, 1975

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner, Frank Erhard, by his attorneys, prays that a Writ of Certiorari issue to review the opinion of the United States Court of Appeals for the Tenth (10th) Circuit entered on August 19, 1975, with mandate stayed pending Certiorari until October 24, 1975.

OPINION BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit which is appended as Appendix A, was entered on the 19th day of August, 1975, with mandate stayed pending Certiorari until October 24, 1975 (Appendix B).

JURISDICTION

The jurisdiction of this Honorable Court is invoked under 28 U.S.C., Sec. 1254(1).

QUESTION PRESENTED AND WHY WRIT SHOULD BE GRANTED

1. Has the Court of Appeals overruled the ancient law of *ferae naturae*, and the statutes of Oklahoma that man has a right to protect his property from the depredations of wild animals? And in this case, man did not kill the animal in protecting his property, rather he rescued the injured animal, treated it, nursed it to health, and trained it to where it was a real good contestant in a national falconry meet—is this a federal crime?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

I. The Fifth Amendment, Constitution of the United States, provides in pertinent part:

"No person shall . . . be deprived of life, liberty, or property, without due process of law . . ."

II. Title 29 O.S.A. 1971, Sec. 317, which provides that:

"Any person who shall knowingly and willfully, by means of any device whatever molest, injure or kill or attempt to injure or kill any species of hawk, owl, or eagle, or who knowingly and willfully removes or destroys any nest, egg, or offspring of any species of hawk, owl, or eagle, shall be guilty of a misdemeanor, punishable by a fine of not to exceed Fifty Dollars ($50.00); *provided, that this act shall not apply* to Sharp Shinned Hawk also known as Little Blue Darter (*accipter velox*), Coopers Hawk also known as Big Blue Darter (*accipter cooperi*), Goshawk (*asturatricapillus*) commonly known as Blue Darter, or *the owner or occupant of any land who shall kill any hawk, owl, or eagle when such hawk, owl, or eagle is in the act of destroying any domestic bird or fowl on such land.*" (Emphasis added)

III. Title 29 O.S.A. 1971, Sec. 318, which provides that:

"Falconry shall be a legal method for hunting and taking resident game in Oklahoma. Hawks, owls, or eagles used for falconry shall not be sold, traded, or bartered and may only be possessed, trained and used for hunting by persons licensed as provided herein. All falconers shall be required to have an annual possession permit which shall expire on January 1, of each year, and an annual Oklahoma hunting license unless legally exempt. Such falconry permit shall be issued by the Oklahoma Department of Wildlife Conservation upon the payment of a Ten Dollar ($10.00) fee therefor. Revenue collected from sales of such permit shall be deposited in the Oklahoma Wildlife Conservation Commission Fund. Licensed persons shall be permitted to possess a maximum of three hawks, three owls, or three eagles (those of which are nonindigenous to North America), or any combination of the three, but totaling no more than three. The Oklahoma Department of Wildlife Conservation shall be authorized to adopt rules and regulations for the enforcement hereof."

STATEMENT OF THE CASE

The defendant, a 1974 graduate of Natural Sciences at Oklahoma State University, Stillwater, Oklahoma, appeals from the affirmance of his conviction of illegal possession of a migratory bird by the Tenth Circuit Court of Appeals.

Some time in October-November, 1973, a prairie falcon flew into defendant's pigeon loft southeast of Stillwater, Oklahoma. In killing three of the defendant's pigeons (Tr. 34-35), she also dislocated her wing. The defendant took the falcon, fixed her wing, nursed her to health, trained her and the falcon became a performing pet—all with the knowledge of the Oklahoma Wildlife Commission. This state agency issued him a Falconry Permit (Tr., Defendant's Exhibit No. 2) and further a Transportation Permit (Tr., Defendant's Exhibit No. 3) to take the falcon to Missouri to a falconry meet.

The defendant had the falcon in his possession when the falcon was taken from him and charges of federal criminal offense were served on him in this case.

The trial magistrate, becoming concerned about Oklahoma law, because of the federal regulation permitting falconry under state law, as published in the Federal Register, Volume 37, No. 204, October 20, 1972, page 22633 (Appendix C), recognized that Title 29 O.S.A. 1971, Section 318, *supra*, makes falconry a sport in Oklahoma, but nevertheless ruled that falcons may not be so used for falconry!

Found guilty and given a deferred sentence, the defendant, who has a clean record, appealed to the Western District of Oklahoma. The court affirmed the Magistrate's decision.

The Tenth Circuit Court of Appeals, in affirming the District Court, stated:

> "Defendant does not dispute that he had possession of the falcon. The manner in which he acquired the bird, namely, when the bird invaded his pigeon roost and injured its wing in the course of killing the pigeons, does not detract from the fact that it was taken from the wilds. Clearly it came to defendant from existence in a wild state."

The opinion was rendered on August 19, 1975, and by order September 24, 1975, pending filing of certiorari prior to October 24, 1975, mandate was stayed.

PORTIONS OF THE TRIAL

The only evidence at the trial as to how the defendant acquired his falcon, and the State of Oklahoma's recognition of his ownership of the falcon is (Tr. 28):

"Q. Now, Frank—I need another one—I hand you here a piece of paper, with the Department of Wildlife Conservation heading on it, would you take a look at that, it's been marked for identification purposes as Defendant's Exhibit 3, would you look at that and tell the court, please, what it is, if you know?

A. It's a transportation permit authorizing me to take two falcons to Missouri, to the North American Falconers Association in St. Louis, Missouri.

Q. What date is it, please?

A. The letter was written on November 7, 1973.

MR. JOHNSTON: No objection.

MR. FITZGERALD: I offer in evidence Defendant's Exhibit 3, your Honor.

THE COURT: Defendant's Exhibit 3 is received in evidence."

and (Tr. 34-35):

"BY MR. FITZGERALD:

Q. Frank, tell the Judge the story of how you got this bird.

A. Well, the pigeon loft was out behind the house, a big open area about two hundred acres, one of my pigeons got free one day and a prairie falcon came out of the sky and chased them into the loft.

When the falcon landed it opened a trap door after them and killed three of them inside the loft.

I went in and caught the bird.

Q. What happened to the prairie falcon in killing the three pigeons?

A. Well, she hit a wing against the side of the trap door and dislocated her wing.

Q. Would you tell the Court, then, what you did as far as the falcon was concerned by way of rehabilitation? that you did?

A. Well, I tried to put the wing back into place, I took care of the bird for three weeks and it finally got okay.

Q. Did you then take the bird into training and train this bird into an accomplished falcon?

A. Yes, sir."

ARGUMENT AND REASONS FOR GRANTING THE WRIT AND QUESTIONS ON REVIEW

The Writ should be granted because the finding of the Circuit Court that,

> "The manner in which he acquired the bird, namely, when the bird invaded his pigeon roost and injured its wing in the course of killing his pigeons, does not detract from the fact it was taken from the wilds. Clearly it came to the Defendant from existence in a wild state."

—is just as clearly in contravention of the common law and the laws of Oklahoma (which as to falconry the federal regulations recognize, Federal Register, Volume 37, No. 204, October 20, 1972, page 22633 Appendix C).

Every court who has heard this case so far has found that the falcon had killed three of the defendant's pigeons before the defendant laid a hand on the bird. None of the lower courts have ever mentioned that (1) the dead pigeons killed by the falcon were the defendant's property; (2) under common law and Oklahoma statutes, defendant had a right to *kill* the falcon when it was destroying the defendant's domestic fowl.

In this case, instead of killing the wounded wild animal that was destroying his property, the defendant doctored it, nursed it and trained it as a pet (for which he stands convicted guilty of a federal crime)!

FIRST THINGS FIRST

Defendant has argued many legal defenses below. None of these were urged because defendant was "just whistling Dixie." Every such ground was well supported and sincere. The challenge of a provision in a United States treaty with Mexico to the *effect* of, "these birds listed (as migratory birds—therein) and such others as the two countries' presidents may agree to." Well, when the presidents add thirty-two (32) Latin name bird families about 35 years later—the defendant thinks such regulation (not statute) is unconstitutional.

Defendant has urged that a criminal statute should be clear and unambiguous. And that the federal statute he is convicted of violating (Title 16 U.S.C.A., Sec. 703) designates migratory birds as those set out in two treaties; between the United States and Great Britain, August 16, 1916, and the United States and the United Mexican States, February 7, 1936.

But that two federal regulations, Federal Register, Volume 37, No. 89, May 6, 1972 page 9223, Appendix D, and Federal Register, Volume 37, No. 204, October 20, 1972, page 22633, Appendix C, add to, and modify those treaties to such an extent that hardly any person in this territory can say what is a migratory bird.

Besides Title 29, O.S.A. 1971, Sec. 317, providing an owner has a right to kill a hawk attacking his domestic fowl, the defendant relies upon authorities as follows:

Hummel v. *State*, 99 P.2d 913 (Okla. Cr.), where the defendants castrated a scrub bull which the owner-plaintiff

permitted to run on the open range with the defendants' thoroughbred cows. Oklahoma Court of Criminal Appeals said defendants could abate or remove such a nuisance.

There is no individual property in wild animals so long as they remain wild, unconfined, and in a state of nature, see *Thompson* v. *Dana*, 52 F.2d 759, *affirmed* S.Ct. 409, 285 U.S. 529, 76 L.Ed. 925.

> "Property ratione soli is the common law right which every owner of land has to kill or take all such animals ferae naturae as may from time to time be found on his land."—3A C.J.S., *Animals*, page 479.

And Volume 3A C.J.S., Sec. 590, page 590, states:

> "As a general rule it is a defense to a charge of cruelty to animals, where the animal was wounded or killed in order to preserve one's property from its depredations, where other means have failed."

It also appears that had the falcon that defendant tamed and trained after its killing his pigeons been the property of some other person—that the other person would have been responsible for the damages to the defendant's property. See *Congress and Empire Spring Co.* v. *Edgar*, 90 U.S. 645, 26 L.Ed. 487.

Besides the above quoted Oklahoma statute, Title 29 O.S.A. 1971, Sec. 317, Oklahoma has an abatement of a nuisance statute, Title 50 O.S.A. 1971, Sec. 14, that provides for methods for abating a private nuisance as follows:

> "A person injured by a private nuisance may abate it by removing, or, if necessary, destroying the thing which constitutes the nuisance, without committing a breach of the peace or doing unnecessary injury."

The defendant, not knowing that three federal courts would hold that every person should know that the interior of his pigeon loft was the "wild," also did not know at the time he took in the injured falcon that the Oklahoma Court of Criminal Appeals had ruled that there was no way under the sun that citizens could know what was a "migratory bird" under an Oklahoma statute—that referred to the same treaties and acts of Congress as the defendant is charged with knowledge of in this case. The two 1972 Interior Department regulations, one adding thirty-two Latin named families of birds, and the other providing for consideration of state falconry laws were not even enacted when the Oklahoma Court of Criminal Appeals, in a case charging a fellow named Powers with illegally shooting a Franklin Gull, stated in *Powers* v. *Owen, County Judge of Alfalfa County* (Okla. Cr.), 419 P.2d 277:

"This is not to say that the legislature in its wisdom may not enact a penal statute prohibiting the shooting of a Franklin Gull; however, such a legislative enactment must meet the constitutional requirement that its mandates are so clearly expressed that any ordinary person can determine in advance what he may and what he may not do under it. See State v. Dabney, 77 Okl.Cr. 331, 141 P.2d 303; Lock v. Falkenstine, Okl. Cr., 380 P.2d 278; Cornelious v. Adkisson, 394 P.2d 651.

"[2] The general rule relating to legislative enactments is succinctly set forth in the Annotation, 70 L. Ed. 322, where it is stated:

> 'A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.'

> "[3] While ignorance of the law is no excuse, our fundamental concept of due process does not require a citizen to employ counsel to research the statutes of Oklahoma, the laws of Congress, and the treaties of the United States, and construe them together, in order to determine whether he may lawfully engage in sporting activities."

CONCLUSION

Defendant's other arguments below are and were valid. The provision in the 1936 treaty with Mexico to include as migratory birds, not only those listed, but "such others as the presidents may determine (*sic*)," and the regulation based upon the presidents' agreement 36 years later, adding another 32 bird families to the list is probably unconstitutional as an illegal assumption of legislative power by the executive branch. The fact that the federal statute under which the defendant is convicted only provides for the designation of migratory birds to be those in the two treaties (and no mention of CFR's thirty-six years later) probably also violates due process of law when the regulation was written just prior to the time defendant got the injured falcon out of his pigeon loft, in that a criminal statute should be clear and not be ambiguous.

But, there comes the time, when the highest court in this land should not have to drink from the muddy, trampled waterhole of precedent as the courts below—and let down its cup into the clear fresh well of reason and drink deeply thereof. Man has not often been charged with a crime because he made a pet of a wild animal that destroyed his property, at least this defendant's lawyers have not found such a case. Is there one?

If the United States Supreme Court affirms this case it will be the first case in history where man was convicted of a crime because instead of killing a wild animal (*ferae naturae*) to protect his property, he treated the injured animal, nursed it back to health, made it a pet, trained it in falconry—and has been charged and found guilty of the federal offense of illegal possession of a migratory bird! On the grounds that he "took" the bird from the "wild" under the terms of a regulation of a department of Oklahoma government (who also had issued a state falconry permit to the defendant).

Man has always been able to protect himself and his property from attack by wild animals (*ferae naturae*).

The simple fact in this case is that the defendant has been convicted of a federal crime because instead of killing a vicious *ferae naturae* to protect his property, he made a pet of the destroyer of his property after treating and nursing it back to health.

For the reasoning set out above the Supreme Court should grant a Writ of Certiorari and render justice in this case.

Respectfully submitted,

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Attorney for Defendant-Petitioner

October, 1975

APPENDIX A

FILED
Aug 19 1975
HOWARD K. PHILLIPS
CLERK, UNITED STATES
COURT OF APPEALS
TENTH CIRCUIT

NOT FOR ROUTINE PUBLICATION

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 75-1316

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. FRANK ERHARD, Defendant-Appellant.	)	Appeal from the United States District Court for the Western District of Oklahoma (D.C. No. CR-74-152)

Submitted on the briefs.

William R. Burkett, United States Attorney, and O. B. Johnston III, Assistant United States Attorney, for Plaintiff-Appellee.

Clee Fitzgerald of Fitzgerald, Houston & Worthington for Defendant-Appellant.

Before McWILLIAMS, BARRETT and DOYLE, Circuit Judges.

DOYLE, Circuit Judge.

The appellant was charged in proceedings before the United States Magistrate in the Western District of Oklahoma with being unlawfully in possession without proper permit of a prairie falcon, a migratory bird, as defined in 50 C.F.R. 10.13 and 16 U.S.C. § 703. The complaint went on to state its basis as being:

> Statement of Special Agent Keith McCartney, Bureau of Sport Fisheries and Wildlife, U. S. Department of the Interior, that on March 6, 1974, he observed Erhard in possession of a prairie falcon at his home in Stillwater, Oklahoma.
>
> Oklahoma Department of Wildlife Conservation records reflected that Erhard had applied for a permit to possess imported falcons and coopers hawks, which category does not include prairie falcons.

The prosecution arises under 16 U.S.C. § 703 which makes it "unlawful at any time, by any means or in any manner to pursue, hunt, take, capture, kill, attempt to take, capture, or kill, possess, offer for sale, sell, offer to barter, barter, offer to purchase, purchase, deliver for shipment, ship, export, import, cause to be shipped, exported, or imported, deliver for transportation, transport or cause to be transported, carry or cause to be carried or receive for shipment, transportation, carriage, or export, any migratory bird . . ." This statute implements the treaties between the United States and Great Britain for the protection of migratory birds and that between the United States and Mexico for the protection of migratory birds. The primary thrust of the statute would appear to be protection of migratory birds against killing, but it goes much further than that and covers most other activities pertaining to migratory birds.

The applicable federal regulation, 32 Fed. Reg. 22633 (1972), prohibits the taking and possessing of birds of the families falconidae except in accordance with the laws and regulations of the state where such act occurs. This regulation states that the taking of falcons from the wilds is prohibited except where the taking is valid in the state where such act occurs.

Defendant here relies on the fact that he had an Oklahoma falconry license authorizing the possession of prairie falcons. He also claims that the Oklahoma law recognizing falconry as a sport brings him within the exception contained in the above mentioned regulation. Defendant also argues that the Magistrate, and in turn the district court, erred in holding that the defendant took the prairie falcon which he admittedly had in his possession from the wilds. The Magistrate's ruling after he heard all of the evidence and arguments was that the falcon is a migratory bird within the meaning of the statute and he further determined that the state statute and regulations did not cover the defendant's action and thus he was not exempt under Oklahoma law.

The cause was next considered by the United States District Court for the Western District of Oklahoma. It rendered an opinion in which it considered all of the points which are now raised and others as well. On the issue of whether or not the conduct of the defendant was accepted by Oklahoma law, the court said:

> Defendant's third contention is equally without merit. The contention is that Vol. 37, No. 204, Federal Register carves out an exception to Section 703 which should be applicable. The pertinent provisions read:
>
> > "Some species included . . . [in the conventions and subsequent agreements specifying Migratory Birds and including falco Mexicanus] have traditionally been used for falconry which is recognized by this Bureau as a legitimate practice when properly and lawfully engaged in by qualified individuals."
>
> Thereafter, the Section states that the taking of falcons from the wild is presently prohibited, but this

restriction is relieved where the individual takes from the wild in accordance with laws and regulations of the State where such act occurs. The defendant contends that the Oklahoma falconry license, validly issued him, authorizes possession of a prairie falcon generically included in the terms of 29 Okla. Stat. §318, quoted in part:

> "All falconers shall be required to have an annual possession permit . . ."

Further,

> "Licensed persons shall be permitted to possess a maximum of three hawks, three owls, or three eagles . . . The Oklahoma Department of Wildlife Conservation shall be authorized to adopt rules and regulations . . ." (This section was repealed and a new section written, 29 Okla. Stat. §5-206; however, section 318 was in force at the time upon which the Complaint was based.)

The foregoing falconry statute is irrelevant to defendant's case. It is not applicable as the license argument fails to distinguish between possession lawful under the falconry statute and the prohibited act of taking from the wild a migratory bird. Regulations promulgated by the Wildlife Conservation Commission state:

> "No person may take any raptore or egg of a raptore (sic) from the wild . . ., except the sharp-skinned (sic), Cooper's hawk and Groshawk."

While the defendant's possession may arguably be under authority of his falconry license, his possession of the prairie falcon is made unlawful by the taking from the wild. The Court recognizes defendant's care of the injured bird to have been humanitarian in its inception; however, even such care for the bird ended

with the defendant thereafter using the prairie falcon to serve defendant's own ends. Such use is an exercise of dominion and control so as to be a prohibited taking from the wild.

The Oklahoma statute which defendant cites and relies on does not embrace his fact situation.

Defendant does not dispute that he had possession of the falcon. The manner in which he acquired the bird, namely, when the bird invaded his pigeon roost and injured its wing in the course of killing the pigeons, does not detract from the fact that it was taken from the wilds. Clearly it came to defendant from existence in a wild state.

We agree with the observations and conclusions of the trial court that the conduct of the defendant was within the reach and spirit of the statute and regulations, and we also agree that the definitions contained in the statute do not provide an escape.

We have examined the other arguments and contentions of the defendant and are convinced that they are also without merit. Accordingly, the judgment of the district court is affirmed.

APPENDIX B

SEPTEMBER TERM — SEPTEMBER 24, 1975

Before the Honorable Robert H. McWilliams, Honorable James E. Barrett, Honorable William E. Doyle, Circuit Judges.

UNITED STATES OF AMERICA Plaintiff-Appellee	)	
vs.	)	Case No. 75-1316
FRANK ERHARD Defendant-Appellant	)	

This matter comes on for consideration of appellants' motion for stay of mandate pending application for a petition for writ of certiorari.

Upon consideration whereof, it is ordered that the mandate is stayed to and including October 24, 1975, pending the timely filing by appellants of a petition for writ of certiorari in the Supreme Court of the United States. If, on or before that date, the Clerk of this Court shall receive notice from the Clerk of the Supreme Court of the United States that a timely petition for writ of certiorari has been filed in that Court, the stay of mandate shall continue until final disposition by the Supreme Court.

Howard K. Phillips, Clerk

By: (s) Robert L. Hoecker
Robert L. Hoecker
Chief Deputy Clerk

A true copy
Teste
[S E A L]
Howard K. Phillips
Clerk, U. S. Court of
Appeals, Tenth Circuit
by
(s) *Teri Pat Campbell*
Deputy Clerk

APPENDIX C

Fish and Wildlife Service

BIRDS OF PREY

Additions to Conference Between United States and United Mexican States for Protection of Migratory Birds and Game Mammals

Pursuant to Article IV of the Convention Between the United States of America and the United Mexican States for the Protection of Migratory Birds and Game Mammals (50 Stat. 1311) (T.S. 912), the President of the United States and the President of the United Mexican States have agreed that 32 families of migratory birds be added to those named in Article IV of the aforesaid Convention. That agreement was formally exchanged by their personal representatives in Mexico City, Mexico, on March 10, 1972. The Migratory Bird Treaty Act (16 U.S.C. 703-711) which implements this Convention makes it unlawful, among other things, for any person to pursue, hunt, take, capture, kill, possess, sell, barter, purchase, ship, transport, export, or import any of these migratory birds except as permitted by the Secretary of the Interior by appropriate regulation.

Included in these 32 families of birds now under Federal protection are the families: (1) *Accipitridae* (eagles and certain hawks), (2) *Falconidae* (falcons and certain hawks), (3) *Strigidae* (owls), and (4) *Tytonidae* (barn owl), commonly referred to as birds of prey. Some species included in the above four families of birds of prey have traditionally been used for falconry which is recognized by this Bureau as a legitimate practice when properly and lawfully engaged in by qualified individuals.

Consultations are currently being held with State wildlife agencies, interested organizations, and individuals in order to develop regulations providing for this utilization as authorized in Article I of the Convention. When devel-

oped, these regulations will be published in the FEDERAL REGISTER as a notice of proposed rule making.

Pending the adoption and publication of final regulations concerning falconry, the following shall apply:

Any person may take, capture, possess, sell, barter, purchase, ship and transport but not import or export live migratory birds of the families (1) *Accipitridae* (excluding bald and golden eagles which are also protected under 16 U.S.C. 688-688d), (2) *Falconidae*, (3) *Strigidae*, and (4) *Tytonidae* only in accordance with laws and regulations of the State where such act occurs: *Provided*, That no person may take or capture in any one calendar year more than three birds which belong to these families: *Provided further*, That no person may take or capture any such species on the U.S. List of Endangered Native Fish and Wildlife (50 CFR Part 17 App. D) nor may any State issue a permit which will allow the taking of any such endangered migratory birds without prior approval from the Director, Bureau of Sport Fisheries and Wildlife, 18th and C Streets NW, Washington, D.C. 20240. Taking any of these named birds from the wild is presently prohibited. This notice and order partially relieves this restriction and is effective upon publication in the FEDERAL REGISTER. (10-20-72).

(16 U.S.C. 704)

APPENDIX D

RULES AND REGULATIONS

Title 50—WILDLIFE AND FISHERIES

Chapter I—Bureau of Sport Fisheries and Wildlife, Fish and Wildlife Service, Department of the Interior

SUBCHAPTER B—HUNTING AND POSSESSION OF WILDLIFE

PART 16—MIGRATORY BIRD PERMITS

Control of Depredating Birds

Pursuant to Article IV of the Convention Between the United States of America and the United Mexican States for the Protection of Migratory Birds and Game Mammals (50 Stat. 1311), the President of the United States and the President of the United Mexican States have agreed that 32 families of migratory birds be added to those named in Article IV of the Convention aforesaid. That agreement was formally exchanged by their personal representatives in Mexico City, Mexico, on March 10, 1972.

The 32 families of migratory birds added by said agreement are:

Scientific name	English name	Spanish name
Accipitridae	Eagles, hawks	Gavilanes, aguilas, aguilillas.
Alcedinidae	Kingfishers	Martin pescador.
Alcidae	Auklets, murres, puffins	Pato de noche.
Anhingidae	Snake birds	Ahuizote.
Aramidae	Limpkins	Totalaca.
Ardeidae	Herons, egrets, bitterns	Garzas, garzones.
Cathartidae	New world vultures	Zopilotes, auras.
Ciconiidae	Stork and wood ibis	Jabiru, Galambac.
Podicipedidae	Grebes	Zambullidores, Buzos.
Corvidae	Ravens, crows, jays	Cuervos, urracas.
Diomedeidae	Albatrosses	Albatros.
Falconidae	Falcons, hawks	Gavilan, Caracara.
Fregatidae	Man-of-war birds	Fragata.
Phalacrocoracidae	Cormorant	Cormoran, corvejon.

Phoenicopteridae	Flamingo	Flamenco.
Gaviidae	Looms	Somorgujos.
Haematopodidae	Oyster catcher	Ostrero.
Hydrobatidae	Storm petrels	Petreles.
Jacanidae	Jacanas	Cirujano.
Laridae	Sea gulls, terns	Gavioetas, Gallito.
Pandionidae	Ospreys	Aguililla pescadora.
Pelecanidae	Pelicans	Pelicanos.
Phaethontidae	Tropic birds	Raba de junco.
Procellariidae	Shearwaters	Petreles, Fulmaros.
Rynchopidae	Skimmers	Rayador,
Sittidae	Nuthatches	Saltapalos.
Stercorariidae	Jaeger	Estercorario, Skus.
Strigidae	Owls	Tecolots, Lechuza.
Sulidae	Boobies, gannets	Bubias.
Threskiornithidae	Spoonbill, ibises	Teoquechol, Cucharera.
Tytonidae	Barn owl	Lecchuzas.
Trogonidae	Trogons	Pabellon, Cuauhtotola.

Included in these families of migratory birds are some species which may require some measure of control or management otherwise because of depredation in certain circumstances.

Consequently, it is determined that Part 16 of Title 50, Code of Federal Regulations, should be amended so as to include these particular species of birds with those now designated in § 16.22, thereby providing for control of depredating birds.

Accordingly, Part 16 of Title 50, Code of Federal Regulations, is amended as follows:

1. In the Table of Contents, the headnote of § 16.22 is amended to read:

Sec.
16.22 Depredating blackbirds, cowbirds, grackles, common crows, magpies, and horned owls.

2. The first paragraph of § 16.22 is amended to read:

§ 16.22 Depredating blackbirds, cowbirds, grackles, common crows, magpies, and horned owls.

A federal permit shall not be required to control yellow-headed, red-winged, bi-colored red-winged, tri-colored

red-winged and Brewer's blackbirds, cowbirds, all grackles, common crows, magpies, and horned owls when found committing or about to commit depredations upon ornamental or shade trees, agricultural crops, livestock, or wildlife, or when concentrated in such numbers and manner as to constitute a health hazard or other nuisance; *Provided:*

* * * * * * *

Since this amendment relies an existing restriction with respect to depredating common crows, magpies, and horned owls and provides for control measures in instances where any of the species named in this section as amended become concentrated in such numbers and manner as to constitute a health hazard or other public nuisance, it is determined that notice and public procedure thereon are impracticable, unnecessary and contrary to the public interest and that this amendment shall become effective upon publication in the FEDERAL REGISTER.

(40 Stat. 755, as amended; 16 U.S.C. 704; and 50 Stat. 1311)

Effective date: Upon publication in the FEDERAL REGISTER (5-6-72).

F. V. SCHMIDT,
Acting Director, Bureau of Sport Fisheries and Wildlife.

MAY 2, 1972.

[FR Doc. 72-6939 Filed 5-5-72; 8:50 am]

Supreme Court, U. S.
FILED
DEC 18 1975
MICHAEL RODAK, JR., CLERK

No. 75-576

In the Supreme Court of the United States

OCTOBER TERM, 1975

FRANK ERHARD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D. C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-576

FRANK ERHARD, PETITIONER

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that he was wrongfully convicted of violating 16 U.S.C. 703, the Migratory Bird Treaty Act, because his admitted possession of a prairie falcon was lawful.

After a trial before a federal magistrate in the United States District Court for the Western District of Oklahoma, petitioner was convicted of unlawful possession of a prairie falcon, a migratory bird within the meaning of 50 C.F.R. 10.13, in violation of Section 703. Imposition of sentence was suspended, and petitioner was placed on two years' probation upon condition that he refrain from engaging in falconry. The district court and court of appeals affirmed (Pet. App. A).

The evidence at trial showed that in November 1973 petitioner found a falcon in his pigeon cage, where it had killed three of his domestic fowl and had dislocated

its wing trying to escape. Petitioner splinted the wing and cared for the falcon until it healed three weeks later, and thereafter continued in possession of the bird (Tr. 29-30, 34-35). In March, 1974, Special Agent Keith McCartney of the United States Fish and Wildlife Service, Department of Interior, observed petitioner in possession of the falcon and, after investigation, filed a complaint under Section 703.

1. The judgment of the court of appeals was entered on August 19, 1975. The petition for a writ of certiorari was not filed until October 16, 1975 and is therefore out of time under Rule 22(2) of the Rules of this Court. In any event, the questions presented do not merit further review.

2. 16 U.S.C. 703 provides in part:

> [E]xcept as permitted by regulations * * * it shall be unlawful * * * by any means or in any manner, to * * * take, capture * * * [or] possess, * * * any migratory bird * * * included in the terms of the conventions between the United States and Great Britain * * * and the United Mexican States * * *.

Regulations promulgated under this statute prohibit possession of a migratory bird except "in accordance with laws and regulations of the State where such act occurs" (Pet. App. C; 37 Fed. Reg. 22633 (1972)). Petitioner contends that his possession of the falcon did not violate Section 703 because (a) under Oklahoma law he was entitled to kill the bird, which he discovered in the act of killing his pigeons, but chose instead to mend its injury, and (b) he had a state permit purportedly entitling him to possess the falcon. Neither contention has merit.

Despite the fact that Oklahoma law[1] permits the owner of domestic fowl to kill any hawk, owl, or eagle that is in the act of destroying his fowl, *possession* of migratory birds, including the prairie falcon, remains expressly

[1]29 Okla. Stat. Anno. § 317 (1970).

prohibited under both state and federal law. Therefore, if petitioner elected not to kill the falcon, he should have given the wounded bird to state or federal fish and wildlife authorities. As a student majoring in zoology and wildlife ecology and a member of the Falconeers' Association (Tr. 26-27), petitioner certainly was aware of the appropriate agencies to take custody of the injured falcon. Even assuming *arguendo* that he properly could have retained possession of the bird during its three-week recovery period, petitioner had no right to continue in possession or to appropriate the bird to his own uses once it had healed sufficiently to return safely to the wild.[2]

Petitioner's possession of a state falconry permit (Tr. 27, 30-31) also did not entitle him to possess the prairie falcon. In the first place, the permit only authorized the possession of not more than three hawks, owls, or eagles that are *nonindigenous* to North America (29 Okla. Stat. Anno. § 318 (1970)), not the *Falco mexicanus*, or prairie falcon. Moreover, the permit does not render lawful a possession that was unlawfully obtained. The Oklahoma falconry regulations state:

> No person may take any raptore or egg of a raptore from the wild in Oklahoma, except the sharpskinned, Coopers hawk and Goshawk.

Petitioner conceded at trial that the prairie falcon was not one of the excepted classes of raptore and that it had in fact been captured from the wild (Tr. 30-32). Thus, petitioner's permit did not extend to the prairie falcon he was convicted of illegally possessing.

3. Petitioner apparently contends that the regulations listing and defining migratory birds, possession of

[2]Petitioner trained the bird after its recovery and entered it in falconry meets (Tr. 35; Pet. 4).

which are proscribed by Section 703, constitute an illegal delegation of legislative authority and violate due process. Although the prairie falcon was not named as a migratory bird in the 1936 convention between the United States and Mexico, the treaty provided that "by common agreement" (50 Stat. 1314) between the contracting parties other birds might be added to those specified in the treaty. Under this authority the family *falconidae* (which includes falcons and hawks) was added in March 1972 to the list of birds protected by the treaty and by Section 703 (Pet. App. D; 37 Fed. Reg. 9223 (1972)). 50 C.F.R. 10.13 contains a complete listing, by common and scientific names, of the migratory birds subject to the provisions of the treaty. Section 703 clearly alerts the reader to the necessity of referring to the conventions and regulations, and the list of protected birds in the regulations is unambiguous.

In making international agreements the President does not exercise legislative authority, since a treaty is not a legislative act. *United States* v. *Rauscher,* 119 U.S. 407. It is primarily a contract between nations. *Whitney* v. *Robertson,* 124 U.S. 190. The treaty-making power is constitutionally vested in the President, with the advice and consent of the Senate. United States Constitution, Art. II, Section 2. Here, by approving the treaty that provided for future agreements by the respective parties to define additional migratory birds, the Senate gave its consent to such action. In conferring the treaty-making power, the Constitution does not prescribe the time or method by which the Senate shall give its advice and consent, and it can as well be given before negotiations as after. The President may be authorized to enter into agreements that do not require subsequent ratification. *Altman & Co.* v. *United States,* 224 U.S. 583.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

DECEMBER 1975.

DOJ-1975-12

Supreme Court, U. S.
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JAN 9 1976
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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-576

FRANK ERHARD,
Petitioner,

VERSUS

UNITED STATES OF AMERICA,
Respondent.

REPLY BRIEF TO THE MEMORANDUM FOR THE UNITED STATES IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

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January, 1976

UTTERBACK TYPESETTING CO., 519 W. CALIF., OKLAHOMA CITY, PH. 235-0030

In the
Supreme Court of the United States
OCTOBER TERM, 1975

No. 75-576

FRANK ERHARD,
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VERSUS

UNITED STATES OF AMERICA,
Respondent.

REPLY BRIEF TO THE MEMORANDUM FOR THE UNITED STATES IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

The government's Memorandum in Opposition fails to deal with the matter of *ferae naturae* which recognizes that man can protect himself and his property from the depredations of wild animals. Petitioner replies to other matters for clarification urging four propositions as follows:

PROPOSITION NO. 1

THE PETITION FOR WRIT OF CERTIORARI IS TIMELY FILED.

Petitioner believes that his Petition for Certiorari is timely filed. Judgment was entered on August 19, 1975. On August 27, 1975, Petitioner filed notice of intent to seek

certiorari and Motion for Stay of Mandate, on September 24, 1975, the 10th Circuit Court of Appeals entered Judgment granting the stay pending application for certiorari until October 24, 1975, and on October 16, 1975, the Petitioner filed forty printed copies of the petition in this Court.

Additionally the Supreme Court is respectfully requested to review the substantial question of denial of due process to this petitioner as raised in the Petition for Certiorari, as this Supreme Court has done in the past in exercising its discretion to the end that justice is done. The Court held that timeliness was not jurisdictional in *Durham* v. *U. S.*, 401 U.S. 481, 91 S.Ct. 858, 28 L.Ed.2d 200, and in *Taglianetti* v. *U. S*, 394 U.S. 316, 89 S.Ct. 1099, 22 L.Ed.2d 302, and in cases cited therein. That such can be waived by the Supreme Court was announced in *Schacht* v. *U. S.*, 398 U.S. 58, 90 S.Ct. 1555, 26 L.Ed.2d 44.

PROPOSITION NO. 2

WITHOUT A LIBRARY CONTAINING THE TREATIES, *AND* ALL FEDERAL REGULATIONS SINCE 1916, A PERSON HAS NO WAY TO DETERMINE WHAT IS A MIGRATORY BIRD UNDER 16 U.S.C. SEC. 703.

On page 4 of the Memorandum in Opposition appears this sentence: "Section 703 clearly alerts the reader to the necessity of referring to the conventions and regulations, and the list of protected birds in the regulations is unambiguous."

The terms of 16 U.S.C. Sec. 703 that refer a person to the two treaties *only* as to what is a migratory bird just are not as *clear* as the Response lets on. The essence of the

due process clause of the Fourteenth Amendment is the rule that all persons "are entitled to be entitled to be informed as to what the state commands or forbids," *Papachristou* v. *City of Jacksonville*, 405 U.S. 156, 92 S.Ct. 839, 31 L.Ed.2d 110.

The Supreme Court in *Wright* v. *Georgia*, 373 U.S. 284, 293, 83 S.Ct. 1240, 1246, 10 L.Ed.2d 349, said that "a conviction under a criminal enactment which does not give adequate notice that the conduct charged is violative of due process."

The reference to the treaties is vague enough—few libraries in Oklahoma have all U. S. Treaties and fewer have all federal regulations, to require a person to search all federal regulations since 1916 or 1936 to find whether or not he is violating a federal law when engaging in a sport licensed by the State of Oklahoma would seem to stretch due process of law to the very breaking point.

Nothing in the record shows that, "if the petitioner elected not to kill the falcon, he should have given the wounded bird to state or federal wildlife authorities"—and no authority is shown for this bit of advice appearing at page 3 of the Memorandum in Opposition.

PROPOSITION NO. 3

OMITTING PUNCTUATION OF WORDING ON OKLAHOMA FALCONRY LICENSE LEADS TO WRONG CONCLUSION.

The record should be quoted or paraphrased accurately.

The Supreme Court will note the wording on Petitioner's Oklahoma Falconry License (Tr. Defendant's Exhibit 2) differs from the paraphrased wording set out on page 3 of the Memorandum in Opposition.

The government's Memorandum in Opposition says,

> "In the first place, the permit only authorized the possession of not more than three hawks, owls, or eagles that are nonindigenous to North America (29 Okla. Stat. Ann. Sec. 318 (1970), * * *."

The license and the statute read,

> "is permitted to possess, * * *, a maximum of three hawks, three owls, or three eagles (those of which are nonindigenous to North America), or any combination of the three, but totaling no more than three."

So when reading the Falconry License from the billfold in his pocket, it is clear that the "nonindigenous to North America," refers only to eagles.

PROPOSITION NO. 4

THE GOVERNMENT'S MOTION IN OPPOSITION IS NOT TIMELY FILED.

Under Rule 24 it would appear that the Memorandum of the United States in Opposition is not timely filed. Fifty days after October 16, 1975, is about December 5, 1975. Under date of December 18, 1975, Petitioner on December 22, 1975, received the Memorandum in Opposition.

CONCLUSION

Petitioner asked in his Petition for Writ of Certiorari if there was a case to be found where man was charged with a crime because he made a pet of a wild animal that destroyed his property. The Memorandum in Opposition does not answer the question.

With all the legal talent available in Washington, D.C., it looks like the government hasn't found such a case either.

Wherefore, the Petitioner again asks the United States Supreme Court to grant his Petition for Writ of Certiorari.

Respectfully submitted,

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January, 1976